No. 87-1241

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

COMMONWEALTH OF PENNSYLVANIA,
Petitioner,

v.

UNION GAS COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* SUPPORTING RESPONDENT

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* SUPPORTING RESPONDENT

This brief *amicus curiae* is filed with the consent of the parties, as provided for in the Rules of the Court.

INTEREST OF THE *AMICUS CURIAE*

The American Federation of Labor and Congress of Industrial Organizations is a federation of 90 national and international unions with a total membership of roughly 13,000,000 working men and women, a significant proportion of whom are employed by state governments and have an interest in proper interpretation of the Eleventh Amendment.

ARGUMENT

Introduction and Summary

Respondent Union Gas has brought suit—in the form of a third-party complaint—against the State of Pennsylvania for monetary damages. The suit is based on a federal statute duly enacted pursuant to the commerce power.[1] The statute expressly provides that, under the circumstances asserted in the complaint here, states may be subject to such suits.[2] The question presented is whether respondent's suit is barred by the Eleventh Amendment.

We believe resolution of this question should begin, and end, with inquiry into whether the Eleventh Amendment applies at all to suits, like the instant one, that are brought to enforce *federal substantive rights*. As we read the text, and the pertinent historical materials, the Eleventh Amendment was intended to apply only to cases

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[1] Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA" or the "Superfund Act"), 42 U.S.C. §§ 9601 *et seq.* (1982) (as amended by Superfund Amendments & Reauthorization Act of 1986, Pub. L. No. 99-499).

[2] 42 U.S.C. § 9601(20)(D).

in which state law supplies the substantive law—diversity cases—and not to federal question cases.

We are aware that since *Hans v. Louisiana*, 134 U.S. 1 (1890), this Court has adopted a contrary view on this point, holding that the Eleventh Amendment applies equally to federal question and diversity actions. In *Welch v. State Dept. of Highways and Public Transp.*, —— U.S. ——, 107 S.Ct. 2941 (1987), however, this Court was evenly divided on the question whether the *Hans* doctrine should be overruled. The *Hans* doctrine has profound consequences for the nature of our federal system. A large and growing body of scholarship supports the view that *Hans* was incorrectly decided.[3] And, respondents in this case have squarely placed the continuing vitality of *Hans* before the Court. This case thus provides an appropriate occasion for resolving the matter in a definitive fashion by overruling *Hans*.

The federal system created by our Constitution is based on bifurcated sovereignties. The states are sovereign with respect to all matters reserved to them, but the states are not sovereign where the action of the federal government constitutes "the supreme Law of the Land." U.S. Const., Art. VI, cl. 2. As Chief Justice Marshall put it in *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 410 (1819):

> In America, the powers of sovereignty are divided between the government of the Union, and those of the States. They are each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other.

With respect to the exercise of powers given to the federal government in the Commerce Clause of Article I, the federal government, not the states, is sovereign. *E.g.*, *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 197-200, 210-211 (1824). In passing the Superfund Act, Congress

[3] See the authorities cited by Justice Brennan in his dissenting opinion in *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 258 n.11 (1985). *See also Welch*, 107 S.Ct. at 2965 n.16, 2967 n.17. (Justice Brennan, dissenting).

legislated within that realm of federal sovereignty. The Superfund Act is therefore "the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., Art. VI, cl. 2. Application of that Act to the states by definition does not infringe upon the sovereignty of the states, because the states are not sovereign with respect to matters dealt with by the Act. For that reason, the doctrine of sovereign immunity, in its classical formulation, is not implicated by a suit in federal court against a state on a Superfund Act claim. In the words of Justice Holmes:

> Some doubts have been expressed as to the source of the immunity of a sovereign power from suit without its own permission, but the answer has been public property since before the days of Hobbes. Leviathan, chap. 26, 2. A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends. [*Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907).]

It is our submission that the Eleventh Amendment was adopted to implement this concept of sovereign immunity in the unique context created by the Constitution's provision of federal judicial power not only over cases arising under the Constitution, statutes and treaties of the United States—as to which the federal government is sovereign and the states are not—but also over diversity cases where the substantive rights in litigation are based upon state, not federal, law. In diversity cases, the states are entitled to sovereign immunity under the classical formulation of that concept as described by Justice Holmes. As we show in this brief, the Eleventh Amendment was intended to apply only to diversity cases and not to federal question cases.

In part I of this brief, we show that the words of the Eleventh Amendment, read together with Article III

of the Constitution, cannot be reconciled with the proposition that the Eleventh Amendment was meant to apply to federal question cases. The words of the Eleventh Amendment do *not* mention suits by citizens against their own state. This omission was not, as this Court has previously assumed, inadvertent. Under the federal judicial power defined in Article III, section 2, a citizen could not bring a diversity action against his own state, but could only sue his state on federal question or admiralty grounds. The words that Congress chose for use in the Eleventh Amendment to restrict federal jurisdiction—excluding from the federal courts suits brought against a state "by citizens of another state, or by citizens or subjects of any foreign state"—were precisely and only the words that had been used in Article III, section 2, to define those categories of federal *diversity* jurisdiction in which states could be sued by private parties. The words of Article III, section 2, that had extended the federal judicial power to federal question cases—which could be brought against any party, including states—were not used or referred to in the Eleventh Amendment. Thus, the natural reading of the Eleventh Amendment is that the Amendment applies only to diversity cases. Had the framers of the Eleventh Amendment intended to bar all suits brought in federal court by private parties against states—including federal question cases—they had only to say so. If that had been their intent, the framers would have had no reason to select out, as they did, only suits against states "by citizens of another state, or by citizens or subjects of any foreign state."

In part II, we show that the conclusion that the Eleventh Amendment was not meant to apply in federal question cases is reinforced when consideration is given to the background of the amendment. The immediate impetus for adoption of the Eleventh Amendment was this Court's decision in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793). *Chisholm* was a *diversity* case brought in federal court upon a state law cause of action against

a state by a citizen of another state. The dissent of Justice Iredell in *Chisholm* is regarded as embodying the substantive rationale of the Eleventh Amendment. We analyze that dissent in detail and show that the logic of Justice Iredell's analysis supporting the applicability of state sovereign immunity is limited to the context of the federal diversity jurisdiction, and that the concepts of sovereignty urged by Justice Iredell support the notion that states should *not* be immune from suit in federal court in federal question cases.

We further show in part II that in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 412 (1821), Chief Justice Marshall in an opinion for the Court ruled (in an alternative holding) that the Eleventh Amendment does *not* apply in a federal question case in federal court by a citizen against his own state. Chief Justice Marshall also had occasion in *Cohens* to set forth the understanding of the framers of the Constitution on the applicability of state sovereign immunity in federal question cases in the federal courts. Chief Justice Marshall concluded that "a case arising under the constitution or laws of the United States, is cognizable in the courts of the Union, whoever may be the parties to that case." *Id.* at 383.

Nearly 70 years after *Cohens* and nearly 100 years after adoption of the Eleventh Amendment, this Court in *Hans v. Louisiana*, 134 U.S. (1890), ruled that the Eleventh Amendment immunizes states from federal question suits in federal courts. In part III, we show that *Hans* is in error. *Hans* was based on a misreading of Justice Iredell's opinion in *Chisholm*, as well as on a misreading of Federalist No. 81 and other sources contemporary to the adoption of the Constitution, and on a disregard for the words of Chief Justice Marshall in *Cohens*. Indeed, *Hans* was based on a disregard for the words of the Eleventh Amendment.

We further show in part III that the effect of *Hans* is continuing and profound, and that the error of that decision cannot be considered to have outlived the period

in which it profitably might be corrected. This is true in two fundamental respects.

First, to grant that states have an immunity from suits brought on matters as to which the federal government is sovereign is correspondingly to diminish the powers given to the federal government. An enhancement of the sovereignty of the states means a corresponding lessening of the sovereignty of the national government. If, as we submit, such enhancement was not intended by the Constitution, *Hans* improperly alters the constitutional scheme.

Second, in order to mitigate the infringement upon proper federal powers that otherwise would result from *Hans*, this Court's Eleventh Amendment decisional law is filled with rules which are difficult to understand in light of the premises of the doctrine and under which the existence of federal authority often turns on whether a variety of empty formalisms are observed. That the sensitive balance between state and federal power has come to depend on *ad hoc* adjustments to the rigor of the *Hans* rule is reason enough to reconsider that rule.

Finally, in part IV of this brief, we show that, under established principles of *stare decisis*, it is appropriate to overrule the decision in *Hans*. And—while the issue is of great moment in terms of the integrity of our constitutional scheme—as a practical matter, such a decision would cause little, if any, disruption to settled expectations as to the application of existing statutes.

I. THE TEXT OF THE ELEVENTH AMENDMENT

The point of departure for analysis of the meaning of a provision of the Constitution is the language of that provision, which after all is what was duly agreed upon and adopted as law. Thus, the words of the provision, read together with the other provisions of the Constitution so as to make sense of the document as a whole, provide the surest guide to the provision's meaning. Yet beginning with *Hans v. Louisiana*, 134 U.S. 1 (1890), the Eleventh Amendment has been interpreted in a manner which, as *Hans* itself acknowledges (*id.* at 15), cannot be squared with the constitutional text.[4]

The Eleventh Amendment provides as follows:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

By its terms, the Eleventh Amendment does not deny the federal courts jurisdiction over suits by citizens against their own state. In holding such suits to be outside the jurisdiction of the federal courts, *Hans* thus read into the Eleventh Amendment a limitation of federal judicial power nowhere contained in the words of the Eleventh Amendment, and gave that Amendment a meaning not even remotely suggested by its text.

The *Hans* Court thought it necessary to thus rewrite the Eleventh Amendment in order to make sense out of the provision. Proceeding from the premise that the Eleventh Amendment "indignantly repelled" all suits against a state by citizens of another state, even where founded upon a federal question, the Court reasoned that, having precluded such suits, it "is almost an absurdity on its face" to allow citizens to bring federal question suits against their own state. 134 U.S. at 15. But the premise that led the Court in *Hans* to rewrite the Eleventh Amendment—that the Amendment bars federal question cases against a state where diversity of citizenship also happens to exist—is an unsound reading of the constitutional text: although the words of the Eleventh Amendment, if taken in isolation, could bear that interpretation, such a construction fails to take into account other provisions of the Constitution that point to a more nat-

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[4] *See also, e.g., Atascadero State Hosp., supra*, 473 U.S. at 238:

> Thus, in *Hans v. Louisiana* [citation omitted], the Court held that the Amendment barred a citizen from bringing a suit against his own State in federal court, even though the express terms of the Amendment do not so provide.

ural meaning that does not require the Amendment to be judicially rewritten.

Specifically, we refer to Article III, section 2, of the Constitution, the provision that defines the "Judicial power of the United States." The Eleventh Amendment expressly is addressed to the scope of that power; the Amendment is, in essence, an amendment of Article III; and, as we will show, the critical words of the Amendment are imported directly from Article III. It is thus essential to look to Article III to illuminate the meaning of the words of the Eleventh Amendment.

Article III, section 2, defines the judicial power of the federal courts by listing the categories of cases to which that power extends.[5] The categories of cases listed are in turn defined by their subject matter or by their parties. Thus, the federal judicial power extends to all federal question cases ("all cases . . . arising under this constitution, the laws of the United States, and treaties made") regardless of the identity of the parties to the case. And, by the same token, the federal judicial power extends to diversity cases (including "Controversies . . . between a State and Citizens of another State; . . . and between a State and foreign States, Citizens or Subjects") regardless of the subject matter of the case.

Thus, under the language of Article III, section 2, taken by itself, there are two types of cases in which

[5] Article III, section 2, provides in pertinent part as follows:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controveries to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—beween Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

a state could be sued in federal court by an individual: A state could be sued in federal court when the *subject matter* of the suit is one specified in that provision—for our purposes, when the suit is a federal question case; or a state could be sued in federal court based on the *identity of the parties*, *e.g.*, when the plaintiff is a citizen of another state or a citizen or subject of a foreign state.

The words used in the Eleventh Amendment to define the category of cases to which the judicial power "shall not . . . extend"—suits brought against states prosecuted "by Citizens of another State, or by Citizens or Subjects of any Foreign State"—are precisely and only the words used in Article III, section 2, to create that part of the *diversity or party* jurisdiction in which states could be sued by private parties.[6] By contrast, the Eleventh Amendment does not use or refer to the words of the Article III, section 2, that extend the federal judicial power to federal question cases.

In this context, the most natural interpretation of the Eleventh Amendment is that the federal courts' *diversity* or *party* jurisdiction shall not extend to suits against states by private parties. Once it is recognized that the words of the Eleventh Amendment are the words used in Article III, section 2, solely to create party jurisdiction, the logic of the Eleventh Amendment is apparent: that Amendment excludes from the federal judicial power diversity cases by private parties against states, but *not* federal question cases. The natural inference is that those words were used in the Eleventh Amendment in the same sense as in Article III, section 2, and were not

[6] Article III, section 2, also provides that the federal judicial power extends to cases against states brought by the federal goverenment, another state, or a foreign state. The Eleventh Amendment has been held not to bar a suit by the United States against a state, or by a state against another state, but to immunize states from suits by foreign states. *See Monaco v. Mississippi*, 292 U.S. 313 (1934); *South Dakota v. North Carolina*, 192 U.S. 286 (1904); *United States v. Texas*, 143 U.S. 621 (1892).

intended to take on a new and more sweeping meaning. Had the framers of the Eleventh Amendment intended to bar all suits brought in federal courts by private parties against states—including federal question cases—they had only to say so. In that event, they would have had no reason to select out, as they did, only suits against states "by Citizens of another State, or by Citizens or Subjects of any Foreign State."

II. THE ORIGINAL UNDERSTANDING OF THE ELEVENTH AMENDMENT

The conclusion reached by analyzing the constitutional text—that the Eleventh Amendment applies only to diversity cases brought by private parties against states based on state law—is reinforced by consideration of the background of the Eleventh Amendment.

A. The immediate impetus for adoption of the Eleventh Amendment was this Court's decision in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793). *Chisholm* was a diversity case brought in federal court upon a state law cause of action—*assumpsit*—against a state by a citizen of another state. Chisholm sought to collect a debt allegedly owed by Georgia. By a four to one majority, the *Chisholm* Court ruled that the case could indeed be maintained in a federal court. That ruling was "displaced" with "vehement speed" by the Eleventh Amendment. *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682, 708 (1949) (Frankfurter, J., dissenting); *see also Hans v. Louiviana, supra*, 134 U.S. at 12.

The dissent of Justice Iredell in *Chisholm* is regarded as embodying the substantive rationale of the Eleventh Amendment. *See* Fletcher, *A Historical Interpretation of the Eleventh Amendment*, 35 Stanford L. Rev. 1033, 1077 (1983) (hereinafter "Fletcher"); Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. Pa. L. Rev. 515, 541 (1978). As the *Hans* Court put it, in light of the Eleventh Amendment there is an "additional interest [in] the able opinion of *Mr. Justice* Iredell on that occasion." 134 U.S.

at 12 (emphasis in original). Properly understood, the concepts of sovereignty urged by Justice Iredell support the notion that states should *not* be immune from suit in federal court in federal question cases.

In his dissent, Justice Iredell focused on whether by entering into the Union and by agreeing to the Constitution the states had given up their sovereign immunity with respect to suits brought in the federal courts. Justice Iredell understood that the considerations governing this question differ depending on whether a case is a federal question case or a diversity case. Thus, Justice Iredell recognized that the states had "delegated" part of their sovereignty to the United States and, accordingly, that the sovereignty of the states was only in the areas that had not been delegated:

> Every state in the union in every instance where its sovereignty has not been delegated to the United States, I consider to be as completely sovereign, as the United States are in respect to the powers surrendered. The United States are sovereign as to all the powers of government actually surrendered. Each state in the union is sovereign as to all the powers reserved. It must necessarily be so, because the United States have no claim to any authority but such as the states have surrendered to them. Of course the part not surrendered must remain as it did before. [2 U.S. at 435.]

With respect to the legislative and executive branches of the federal government, Justice Iredell believed, this bifurcation of sovereignties posed no particular problem:

> The powers of the general government, either of a legislative or executive nature, or which particularly concern treaties with foreign powers, do for the most part (if not wholly) affect individuals, and not states. They require no aid from any state authority. This is the great leading distinction between the old articles of confederation, and the present constitution. [*Id.*]

But, as Justice Iredell put it, "[t]he judicial power is of a peculiar kind." *Id.* The peculiarity, in his view,

stemmed from the fact that the judicial power extends to two quite different categories of cases. The first category—like the executive and legislative power of the federal government—simply involves the judiciary in matters wholly encompassed by the federal sovereignty. In this category of cases, the federal judicial power "is indeed commensurate with the ordinary legislative and executive powers of the general government, and the power which concerns treaties." *Id.* This "part of the judicial power . . . relate[s] to the execution of the other authorities of the general government (which it must be admitted are full and discretionary, within the restrictions of the constitution itself). . . ." *Id.* at 432. In present terminology, this "part of the [federal] judicial power" is the power to decide federal question cases.

It is at least implicit in Justice Iredell's discussion of the power of federal courts to decide federal questions that such power could not implicate any question of state sovereign immunity. By his analysis, the states had no sovereignty as to federal questions. "But," in Justice Iredell's words, the federal judicial power "also goes further." *Id.* at 435. And, it was in this "further" extension of the federal judicial power that Justice Iredell found the sovereign immunity of the states to be implicated. For in exercising this part of the federal judicial power—the power to decide diversity cases—the judiciary was not operating as to subject matters within the realm of federal sovereignty but was instead merely providing a neutral forum for the resolution of issues as to which the states had not given up their sovereignty. Indeed, the source of the legal rights to be resolved in such cases was state law, as to which the states by definition were sovereign.[7]

[7] It is apparent from the face of his opinion that Justice Iredell assumed, contrary to what the Court later erroneously held in *Swift v. Tyson*, 41 U.S. 1 (16 Pet.) (1842), that state law, not general federal common law, is the source of substantive law in diversity actions. 2 U.S. at 435-437. *See* Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1472 (1987) (one footnote omitted):

> Iredell presaged *Erie Railroad Co. v. Tompkins*' [304 U.S. 64 (1938)] repudiation of [the *Swift v. Tyson*] doctrine. The liability of the state in assumpsit, he argued, should be determined not by general federal common law, but by antecedent state law.[197] And under a state common law rule of unquestioned constitutionality, no assumpsit lay against Georgia. For Iredell, Georgia's "sovereign" immunity was therefore exactly coextensive with her derivative "sovereign" lawmaking capacity: A state could use its lawmaking power to adopt rules immunizing itself from liability, as long as such immunity frustrated no higher-law restrictions on the state's limited sovereignty.

[197] Since he read the relevant congressional statutes to incorporate state law, Iredell did not reach the question of *congressional* power to displace state law rules of decision in diversity-type controversies. On this count, the *Erie* Court went further when it suggested that the diversity and necessary and proper clauses standing alone did not empower Congress to enact a general federal statutory rule of decision or to authorize a general federal common law.

Iredell also diverged from *Erie* in his emphasis on state law at the time of the ratification of the Constitution and adoption of the Judiciary Act instead of at the time of the lawsuit. This freezing of state law more closely resembles the static conformity methodology of the federal Process Acts of 1789 and 1792 . . . than the dynamic conformity methodology required by *Erie* and the Rules of Decision Act. [Emphasis in original]

The following excerpts from Justice Iredell's opinion show that his concerns about state sovereignty were a consequence of these attributes of the diversity jurisdiction and have no application in federal question cases:

> But [the federal judicial power] also goes further. Where certain *parties* are concerned, although the *subject* in controversy does not relate to any of the special objects of authority of the general government, wherein the separate sovereignties of the states are blended in one common mass of supremacy, yet the general government has a judicial au-

thority in regard to such subjects of controversy, and the legislature of the United States may pass all laws necessary to give such judicial authority its proper effect. So far as states under the constitution can be made legally liable to this authority, so far to be sure they are subordinate to the authority of the United States, and their individual sovereignty is in this respect limited. But it is limited no farther than the necessary execution of such authority requires. [*Id.* at 435-436 (emphasis added)]

• • •

It follows, therefore, unquestionably, I think, that looking at the [First Judiciary Act], which I consider is on this occasion the limit of our authority (whatever further might be constitutionally, enacted[)] we can exercise no authority in the present instance consistently with the clear intention of the act, but such as a proper state court would have been at least competent to exercise at the time the act was passed.

> If therefore, no new remedy be provided (as plainly is the case[)] and consequently we have no other rule to govern us but the principles of the pre-existent [state] laws, which must remain in force till superceded by others, then it is incumbent upon us to enquire, whether previous to the adoption of the Constitution . . . an action of the nature like this before the court could have been maintained against one of the states in the Union upon the principles of the common law, which I have shown to be alone applicable. If it could, I think it is now maintainable here: If it could not, I think, as the law stands at present, it is not maintainable. . . . [*Id.* at 436-437.] [8]

[8] Having dealt with the question presented to the Court, Justice Iredell ventured "to intimate my present opinion" on an issue he acknowledged was not before the Court:

> So much however, has been said on the constitution, that it may not be improper to intimate that my present opinion is strongly against any construction of it, which will admit, under any circumstances, a compulsive suit against a state for the recovery of money. I think every word in the constitution may have its full effect without involving this consequence, and that nothing but express words, or an insurmountable implication (neither of which I consider, can be found in this case) would authorize the deduction of so high a power. This opinion I hold, however, with all the reserve proper for one, which, according to my sentiments in this case, may be deemed in some measure extra-judicial. [2 U.S. at 449-450].

Professor Amar summarized the essence of Justice Iredell's dissent:

> Thus, Iredell carefully limited his discussion to pure diverse party cases against states, in which jurisdiction did not rest upon a substantive federal cause of action based on a congressional statute or the self-executing provisions of the Constitution. The particular question before the Court was for Iredell a narrow one: "[W]ill an action of *assumpsit* lie against a State? This particular question [must

There is no reason to believe that the Framers and enactors of the Eleventh Amendment meant to incorporate these musings on a problem that had not to that point ever arisen. Rather, as the terms of the Amendment strongly suggest, the Amendment was addressed to the issue Justice Iredell believed was raised by *Chisholm*: whether in a diversity case, where the only federal role is the provision of a forum for the resolution of issues of state law, states may be deprived of their right to sovereign immunity.

Moreover, the context of these *dicta* suggests that Justice Iredell may have had in mind an issue other than the general power of the federal government to use its delegated authority to make laws subjecting the states to monetary liability. Instead, Justice Iredell may have been venturing an opinion on a narrower point that he alluded to at several places in his opinion: whether Congress has the power to prescribe the substantive law to be applied in diversity cases, and, in the particular instance of the *dicta* in question, whether Congress may, in the course of prescribing such laws for diversity cases, subject the states to monetary liability in suits brought by individuals. See *supra* at note 7. The likelihood that this narrower point is the one Justice Iredell was addressing is greatly strengthened by the fact that at the time of *Chisholm* the Judiciary Act provided *only for diversity jurisdiction*, and not federal question jurisdiction, in the inferior federal courts. Lower federal courts were not granted federal question jurisdiction until the Judiciary Act of 1875. Act of March 3, 1875, 18 Stat. 470.

be] . . . abstracted from the general one, viz. Whether a State can in any instance be sued?" Although no assumpsit suit lay against Georgia on principles of "general jurisprudence," Iredell conceded that a different result might obtain in a federal question case "relat[ing] to the execution of the . . . authorities of the general Government (which it must be admitted are full and discretionary, within the restrictions of the Constitution itself)." In such cases, state "sovereignty has . . . been . . . delegated to the United States . . . wherein the separate sovereignties of the States are blended in one common mass of supremacy." [96 Yale L.J. at 1472-1473 (footnotes omitted).]

The Eleventh Amendment, then, was adopted in reaction to this Court's decision in a diversity case and on the heels of Justice Iredell's dissenting opinion which gave a justification for recognition of state sovereign immunity *only* in diversity cases. It is not surprising therefore that, as we have shown, the text of the Eleventh Amendment is directed only at diversity cases.

While the text of the Amendment, together with its immediate background, should be dispositive, it is worth noting that Justice Iredell's analysis in fact correctly reflected the views of those who enacted and ratified the Constitution. Those materials are exhaustively canvassed in Justice Brennan's dissenting opinion in *Atascadero State Hosp., supra*, 473 U.S. at 259-290.[9] Suffice it to say here that, as those materials show, invariably the issue of state sovereign immunity arose in the context of the diversity jurisdiction clauses of Article III, section 2. That the states would, or at least might, have no immunity from suit in federal courts on federal questions seems not to have been a matter of concern to those who adopted the Constitution.

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[9] Justice Brennan's dissenting opinion in *Atascadero State Hosp.*, 473 U.S. at 284-290, also describes in detail the legislative history of the Eleventh Amendment itself, which history, while not particularly illuminating, is wholly consistent with the interpretation pressed in this brief.

B. Nearly 70 years before the decision in *Hans*, Chief Justice Marshall had occasion to address the meaning of the Eleventh Amendment in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821). In that case, this Court sustained its power to entertain a writ of error to a state court on a federal question in a case where the state was a party, having sought to prosecute one of its own citizens. After first concluding that a writ of error is not a "suit" under the Eleventh Amendment, Chief Justice Marshall, writing for the Court, stated an alternative holding:

> But should we in this be mistaken, the error does not affect the case now before the court. If this writ of error be a suit in the sense of the 11th amendment, it is not a suit commenced or prosecuted "by a citizen of another state, or by a citizen or subject of any foreign state." It is not, then, within the amendment, but is governed entirely by the constitution as originally framed, and we have already seen, that in its origin, the judicial power was extended to all cases arising under the constitution or laws of the United States, without respect to parties. [*Id.* at 412.]

The discussion referred to in the above passage respecting "the constitution as originally framed" is as important as this alternative holding, because that discussion sets forth the understanding of Chief Justice Marshall and the *Cohens* Court on the applicability of state sovereign immunity in federal question cases in the federal courts under the Constitution as originally drafted. In that part of the opinion, Chief Justice Marshall began by making clear that when a sovereign entity has agreed to yield a portion of its sovereignty, that entity must be understood to have given up as well the immunity from suit that is incidental to the yielded sovereignty:

> The Counsel for the [state] . . . have laid down the general proposition, that a sovereign independent state is not suable except by its own consent.
>
> This general proposition will not be controverted. But its consent is not requisite in each particular

> case. It may be given in a general law. And if a state has surrendered any portion of its sovereignty, the question whether a liability to suit be a part of this portion, depends on the instrument by which the surrender is made. If, upon a just construction of that instrument, it shall appear that the state has submitted to be sued, then it has parted with this sovereign right of judging in every case on the justice of its own pretensions, and has entrusted that power to a tribunal in whose impartiality it confides. [*Id.* at 380.]

The Chief Justice then went on to find that in joining the Union and agreeing to the Constitution, the states had indeed given up a significant measure of their sovereignty. In particular, he pointed to the Supremacy Clause as the manifestation of that transfer:

> The American States, as well as the American people, have believed a close and firm Union to be essential to their liberty and to their happiness. They have been taught by experience, that this Union cannot exist without a government for the whole; and they have been taught by the same experience that this government would be a mere shadow, that must disappoint all their hopes, unless invested with large portions of that sovereignty which belongs to independent states. Under the influence of this opinion, and thus instructed by experience, the American people, in the conventions of their respective states, adopted the present constitution.
>
> If it could be doubted, whether from its nature, it were not supreme in all cases, where it is empowered to act, that doubt would be removed by the declaration, that "this constitution, and the laws of the United States, which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby; anything in the constitution or laws of any state to the contrary notwithstanding."
>
> This is the authoritative language of the American people; and, if gentlemen please, of the Ameri-

> can States. It marks, with lines too strong to be mistaken, the characteristic distinction between the government of the Union and those of the states. The general government, though limited as to its objects, is supreme with respect to those objects. This principle is a part of the constitution; and if there be any who deny its necessity, none can deny its authority. [*Id.* at 380-381.]

On the premises thus established, Chief Justice Marshall concluded that the states had given up their sovereign immunity as to matters now within the sovereignty of the United States:

> With the ample powers confided to this supreme government . . . are connected many express and important limitations on the sovereignty of the states, which are made for the same purposes. The powers of the Union, on the great subjects of war, peace, and commerce, and on many others, are in themselves limitations of the sovereignty of the states; but in addition to these, the sovereignty of the states is surrendered in many instances where the surrender can only operate to the benefit of the people, and where, perhaps, no other power is conferred on Congress than a conservative power to maintain the principles established in the constitution. The maintenance of these principles in their purity, is certainly among the great duties of the government. One of the instruments by which this duty may be peaceably performed, is the judicial department. It is authorized to decide all cases of every description, arising under the constitution or laws of the United States. From this general grant of jurisdiction, no exception is made of those cases in which a state may be a party. When we consider the situation of the government of the Union and of a state, in relation to each other; the nature of our Constitution; the subordination of the state governments to that constitution; the great purpose for which jurisdiction over all cases arising under the constitution and laws of the United States is confided to the judicial department, are we at liberty to insert in this general grant, an exception of those

> cases in which a state may be a party? Will the spirit of the constitution justify this attempt to control its words? We think it will not. *We think a case arising under the constitution or laws of the United States, is cognizable in the courts of the Union, whoever may be the parties to that case.* [*Id.* at 382-383 (emphasis added.)]

III. THE ERROR OF *HANS*

A. In the face of these authorities, in 1890—nearly seventy years after *Cohens* and almost one hundred years after the Eleventh Amendment was adopted—the *Hans* Court ruled that the Amendment immunizes states from federal question suits brought by private parties in the federal courts. In reaching this result, the *Hans* Court relied primarily on Justice Iredell's dissent in *Chisholm* and on other materials addressed to the question of state sovereign immunity in *diversity* cases. It is clear from the face of the opinion that the Court in *Hans* misunderstood the purport of these materials.

Thus, in discussing the dissent by Justice Iredell, the *Hans* Court acknowledged that the controversy in *Chisholm* centered on the application of state sovereign immunity in diversity cases, but then ignored that limitation in drawing its conclusion:

> The other justices were more swayed by a close observance of the letter of the Constitution, without regard to former experience and usage; and because the letter said that the judicial power shall extend to controversies "between a State and citizens of another State;" and "between a State and foreign states, citizens or subjects," they felt constrained to see in this language a power to enable the individual citizens of one State, or of a foreign state, to sue another State of the Union in the federal courts. *Justice* Iredell, on the contrary, contended that it was not the intention to create new and unheard of remedies, by subjecting sovereign States to actions at the suit of individuals (which he conclusively showed was never done before), but only, by proper legislation, to invest the federal courts

> with jurisdiction to hear and determine controversies and cases between the parties designated, that were properly susceptible of litigation in courts. [134 U.S. at 12.]

The *Hans* Court similarly mistook the point of a passage from Federalist No. 81, authored by Alexander Hamilton, on which the *Hans* Court heavily relied. Hamilton wrote:

> It has been suggested that an assignment of the public securities of one State to the citizens of another would enable them to prosecute that State in the federal courts from the amount of those securities; a suggestion which the following considerations prove to be without foundation.
>
> It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States and the danger intimated must be merely ideal. The circumstances which are necessary to produce an alienation of State sovereignty were discussed in considering the article of taxation and need not be repeated here.[10] A recurrence to the principles there established will satisfy us that there is no color to pretend that the State governments would, by the adoption of that plan, be divested of

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[10] This reference is to Federalist No. 32, in which Hamilton stated three circumstances which "produce an alienation of State sovereignty":

> where the Constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union, and in another prohibited the States from exercising the like authority; and where it granted an authority to the Union to which a similar authority in the States would be absolutey and totally *contradictory and repugnant.* [Federalist No. 32 (Hamilton), *The Federalist* (Modern Library Ed.), at 198 (emphasis in original).]

> the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action independent of the sovereign will. [Federalist No. 81 (Hamilton), *The Federalist* (Modern Library Ed.), at 529-530 (emphasis removed).]

As is apparent from Hamilton's description of the issue being addressed—"that an assignment of the public securities of one State to the citizens of another would enable them to prosecute that State in the federal courts for the amount of those securities"—the cause for concern was the diversity jurisdiction, not the federal question jurisdiction. Indeed, implicit in Hamilton's discussion of this issue is that states could be sued in federal courts on federal questions. Thus, Hamilton linked the ability of the states to claim sovereign immunity only to those matters as to which the states would retain their sovereignty. Immunity from suit was "in the nature of sovereignty" and accordingly except as to those matters upon which the Constitution "produce[d] an alienation of State sovereignty" the states would remain immune. By implication, as to those matters upon which the Constitution effected an "alienation of State sovereignty," the states would not be immune.

The *Hans* Court recognized that Federalist No. 81 was addressed to a problem created by the diversity clause, but erroneously assumed without analysis that the same reasoning applied in federal question cases as well:

> The obnoxious clause to which Hamilton's argument was directed, and which was the ground of the objections which he so forcibly met, was that which declared that "the judicial power shall extend to all . . . controversies between a State and citizens of another State, . . . and between a State and foreign states, citizens or subjects." It was argued by the opponents of the Constitution that this clause would authorize jurisdiction to be given to the federal

> courts to entertain suits against a State brought by the citizens of another State, or of a foreign state. Adhering to the mere letter, it might be so; and so, in fact, the supreme court held in *Chisholm v. Georgia*; but looking at the subject as Hamilton did, and as *Mr. Justice* Iredell did, in the light of history and experience and the established order of things, the views of the latter were clearly right,—as the people of the United States in their sovereign capacity subsequently decided. [134 U.S. at 13-14 (emphasis in original).] [11]

The *Hans* Court did acknowledge that the alternative holding of *Cohens v. Virginia* was contrary to the decision in *Hans*, but the Court dismissed that precedent in the following manner:

> It must be conceded that the last observation of the chief justice does favor the argument of the plaintiff. But the observation was unnecessary to the decision, and in that sense *extrajudicial*, and, though made by one who seldom used words without due reflection, ought not to outweigh the important considerations referred to which lead to a different conclusion. [134 U.S. at 20 (emphasis in original).]

The *Hans* ruling, then, was based on a misreading of the words of Justice Iredell and of Hamilton, and a disregard for the words of Chief Justice Marshall. Even more, that opinion was based on a disregard for the words of the Eleventh Amendment. Yet this opinion became the foundation for modern analysis of the Eleventh Amendment.

B. The effect of *Hans* is continuing and profound, and thus the error of that decision cannot be considered to have outlived the period in which it profitably might be corrected.

1. This Court has stated that the significance of the Eleventh Amendment "lies in its affirmation that the fundamental principle of sovereign immunity limits the

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[11] Other materials from the constitutional debates cited by the *Hans* Court are similarly addressed to the question of sovereign immunity in the diversity context. 134 U.S. at 14.

grant of judicial authority in Art. III." *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 98 (1984); *see also*, *Atascadero State Hosp.*, 473 U.S. at 238. That statement is of course correct. But as we have seen, the "fundamental principle of sovereign immunity," both in its classical formulation and as understood by this Nation's founders, has no application when a state is sued in federal court upon a federal question. In their nature, federal questions are matters as to which the states are *not* sovereign.

In *Ex parte Virginia*, 100 U.S. 339, 346 (1880), this Court stated: "[E]very addition of power to the General Government involves a corresponding diminution of the governmental powers of the States. It is carved out of them." The obverse is equally true. To grant that states have an immunity from suits brought on matters as to which the federal government is sovereign is correspondingly to diminish the powers given to the federal government. An enhancement of the sovereignty of the states means a corresponding lessening of the sovereignty of the national government. If, as we have seen here, such enhancement was not intended by the Constitution, *Hans* improperly alters the constitutional scheme.

2. One hallmark of an unsatisfactory doctrine is the evolution of decisional law that is replete with fictions and anomalies. This Court's Eleventh Amendment jurisprudence stands as a prime example. In an effort to mitigate the effects that otherwise would result from *Hans*, a series of Eleventh Amendment rules have been developed by this Court, which are difficult to understand in light of the premises of the doctrine, and under which the existence of federal authority often turns on whether a variety of empty formalisms are observed. The problems are so acute that this Court's decisional law on the Eleventh Amendment has been described by one commentator as "a morass." Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit Upon the States*, 126 U. Pa. L. Rev. 1203, 1209 (1978) (hereinafter "Field, Part

Two"). That the sensitive balance between the state and federal power has come to depend on *ad hoc* adjustments to the rigor of the *Hans* rule is reason enough to reconsider the rule.

a. Various provisions of the Constitution place limitations on the powers of the states and confer rights on individuals as against the states. If left undiminished, *Hans* would have permitted the states to flout these constitutional commands—and to violate constitutional rights—without being subject to any court enforcement or sanction.[12] To mitigate these consequences, the Court in *Ex parte Young*, 209 U.S. 123 (1908), held that the Eleventh Amendment does not bar federal court actions against a state officer in his official capacity even though "official-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent," *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 690 n.55 (1978).

The doctrine of *Ex parte Young* gives the federal courts some power to enforce against the states federal constitutional and statutory guarantees and to issue decrees that effectively bind the states. Indeed, as the Court observed in *Edelman v. Jordan*, 415 U.S. 651, 667-668 (1974), under that doctrine, where a state has been proven to have acted unlawfully, the federal courts may remedy the violation by issuing affirmative injunctions whose "necessary result" is to impose "fiscal consequences [on] state treasuries." Yet the Court in *Edelman* held that a judgment requiring that even a penny of compensation be paid to make whole the victim of the state's wrong is barred by the Eleventh Amendment on the theory that such an award "resembles far more closely [a] monetary award against the State itself." *Id.* at 665.

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[12] The statement in text is certainly true with respect to enforcement or sanction in the federal courts, and presumably true as well for enforcement or sanction in the state courts. See *infra* at 27-28.

The Court in *Edelman* acknowledged that "the difference between the type of relief barred by the Eleventh Amendment and that permitted under *Ex parte Young* will not in many instances be that between day and night." 415 U.S. at 667. Subsequent cases bear that statement out and draw lines more nice than obvious between decrees having "an ancillary effect on the state treasury [which] is permissible." *id.* at 668, and decrees which "resemble[] far more closely [a] monetary award against the State itself," *id.* at 665. *See Hutto v. Finney*, 437 U.S. 678, 689-693 (1978); *Quern v. Jordan*, 440 U.S. 332 (1979).

b. Insofar as *Hans* immunizes the states from any liability for violating federal law, the decision effectively diminishes Congress' delegated powers, including its power to regulate interstate commerce. Unease with this consequence has led the Court to experiment with varying formulations for determining when and whether a state, by engaging in a federally-regulated activity, may be said to have waived its Eleventh Amendment protection against federal question suits. *Compare Parden v. Terminal R. Co.*, *supra*, 377 U.S. 184, 192-197 (1964), *with Edelman v. Jordan*, *supra*, 415 U.S. at 671-675, and *Atascadero State Hosp. v. Scanlon*, *supra*, 473 U.S. at 238 n.1, 241. This Court has suggested as well that Congress in exercising its power under the Commerce Clause can "lift" or "abrogate" the states' Eleventh Amendment immunity; a suggestion this Court may have to confront in this case if, contrary to our position, the Court determines not to overrule *Hans*. *See also Welch*, 107 S.Ct. at 2948 n.8.

Moreover, the Court has held that Congress, in exercising its power under the fifth section of the Fourteenth Amendment, can "lift" or "abrogate" the states' Eleventh Amendment immunity. *Atascadero State Hosp. v. Scanlon*, 473 U.S. at 242, *see also Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). And the Court has developed a set of unique rules of statutory construction to determine

whether Congress has effectively overriden the states' immunity. *See Atascadero State Hosp.*, *supra*.

Recognizing a power of Congress to abrogate the states' immunity does save some of the federal sovereignty from the incursions that otherwise would result from *Hans*. But it is difficult to square such a congressional power with the premise of *Hans*, *viz.*, that the Eleventh Amendment grants the states a *constitutional* immunity from federal question suits. *See Field*, Part Two, 126 U. Pa. L. Rev. at 1209-1218, 1230. And a doctrine under which federal authority depends upon the form of words used by Congress in exercising a sovereign authority demeans both Article I and the Eleventh Amendment.

c. In a final effort to mitigate the impact of *Hans*, the Court has grappled with, but has not resolved, the question whether the states must entertain suits in their own courts to enforce federal rights. Justice Marshall broached the issue in his concurring opinion in *Employees v. Missouri Public Health Dept.*, in which he stated:

> While constitutional limitations upon the federal judicial power bar a federal court action by these employees to enforce their rights, the courts of the State nevertheless have an independent constitutional obligation to entertain employee actions to enforce those rights. See *Testa v. Katt*, 330 U.S. 386 (1947). See also *General Oil Co. v. Crain*, 209 U.S. 211 (1908). [411 U.S. at 298.]

The Court in *Atascadero State Hosp.*, *supra*, 473 U.S. at 238 n.2, seems to have given some credence to this view:

> Justice BRENNAN's dissent also argues that in the absence of jurisdiction in the federal courts, the States are "exempt[] . . . from compliance with laws that bind every other legal actor in our nation." *Post*, at 3150. This claim wholly misconceives our federal system. As Justice MARSHALL has noted, "the issue is not the general immunity of the States from private suit . . . but merely the susceptibility of the States to suit before *federal tri-*

> *bunals." Employees v. Missouri Public Health & Welfare Dept., supra*, 411 U.S., at 293-294, 93 S.Ct., at 1622-1623 (MARSHALL, J., concurring in the result) (emphasis added). It denigrates the judges who serve on the state courts to suggest that they will not enforce the supreme law of the land. See *Martin v. Hunter's Lessee*, 1 Wheat. 304, 341-344, 4 L.Ed. 97 (1816). See also *Stone v. Powell*, 428 U.S. 465, 493, n.35, 96 S.Ct. 3037, 3052, n.35, 49 L.Ed. 1067 (1976), and *post*, at 3155, n.8.

See also Welch, 107 S.Ct. at 2953.

Thus, to assure that federal rights are fully enforceable as against the states the Court has suggested that, as a matter of federal law, state courts may be compelled to entertain federal law claims against states, notwithstanding whatever sovereign immunity the states otherwise enjoy from being sued in their own courts. But, of course, this "solution" to the problem posed by *Hans* would turn our system of bifurcated sovereignties on its head by requiring the federal government to rely on state courts for enforcement of federal statutory and constitutional rights. *See* Fletcher, *supra*, 35 Stanford L. Rev. at 1098. Even more parodoxically, the "fundamental principle of sovereign immunity," which purportedly requires protection of the states against federal question suits in the federal courts, would under this view provide them no similar protection in their own courts.

These problems of Eleventh Amendment jurisprudence are all attributable to the "wrong turn" taken in *Hans*.[13] A return to the principles intended by the framers of the Eleventh Amendment would eliminate these problems. The federal government would be given back the full measure of sovereignty intended by the Constitution. And no fictions or artificial constructions would be necessary to permit the federal government to do its intended job.

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[13] See Shapiro, *Wrong Turns: The Eleventh Amendment and the* Pennhurst *Case*, 98 Harv. L. Rev. 61 (1984).

IV. THE QUESTION OF *STARE DECISIS*

Justice Powell, in his concurring opinion in *Mitchell v. W. T. Grant Co.*, 416 U.S. 600, 627-628 (1974), accurately summarized the doctrine of *stare decisis* as it has been applied by this Court to issues of constitutional interpretation:

> To be sure, *stare decisis* promotes the important considerations of consistency and predictability in judicial decisions and represents a wise and appropriate policy in most instances. But that doctrine has never been thought to stand as an absolute bar to reconsideration of a prior decision, especially with respect to matters of constitutional interpretation. Where the Court errs in its construction of a statute, correction may always be accomplished by legislative action. Revision of a constitutional interpretation, on the other hand, is often impossible as a practical matter, for it requires the cumbersome route of constitutional amendment. It is thus not only our prerogative but also our duty to re-examine a precedent where its reasoning or understanding of the Constitution is fairly called into question. And if the precedent or its rationale is of doubtful validity, then it should not stand. As Mr. Chief Justice Taney commented more than a century ago, a constitutional decision of this Court should be "always open to discussion when it is supposed to have been founded in error, [so] that [our] judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported." *Passenger Cases*, 7 How. 283, 470 (1849). [Footnote omitted.]

See, e.g., Garcia v. San Antonio Metro Transit Auth., 469 U.S. 528, 546-547 (1985); *Gideon v. Wainwright*, 372 U.S. 335 (1963).

The conditions for overruling a constitutional precedent are met in this case. *Hans*, as we have shown, is clearly in error as to the scope of an amendment to the Constitution. That error has resulted in a fundamental [illegible]ion in the balance of power as between the basic governmental units in our federal system: the sovereignty of the states has been improperly enhanced at the

expense of the sovereignty of the national government. *See supra* at 23-24. Moreover, in order to mitigate the practical consequences of that error, this Court has had to create a legal patchwork of fictions and empty formalisms, often leading to anomalous results. *See supra* at 24-28. In these circumstances, *stare decisis* should be no barrier to correction of the error of *Hans*.

Moreover—while the issue is of great moment in terms of the integrity of our constitutional scheme—as a practical matter, overruling *Hans* likely would cause little, if any, disruption to settled expectations as to the application of existing statutes. If there is no constitutional bar to subjecting states to suit in federal courts in federal question cases, *the question would remain, did Congress intend such a result in enacting any particular statute.*

The answer to that question will in all likelihood require reference to the state of this Court's Eleventh Amendment jurisprudence at the time the statute was enacted. In enacting legislation, Congress is presumed to be aware of, and to take into account, relevant prevailing interpretations of the Constitution by this Court. *See, e.g., F.P.C. v. Tuscarora Indian Nation*, 362 U.S. 99, 113 (1960). If, for example, a statute was enacted at a time when *Parden* and *Missouri Health Dept.* stated this Court's view as to when and how Congress may "lift" a state's Eleventh Amendment immunity, then the congressional intent would have to be determined against the backdrop of those decisions. Thus, as respects *statutes already enacted*, this Court's existing Eleventh Amendment decisional law will play a continuing role: those decisions will provide a framework for discerning whether Congress intended a statute to apply to the states. *See Welch*, 107 S.Ct. at 2958 (Justice Scalia, concurring).

CONCLUSION

For the foregoing reasons, the decision of the court below should be affirmed.

Respectfully submitted,

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